Supreme Court, U.S.
FILED

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No. 95-553 OCT 3 - 1995

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOSEPH LEE ROWLAND - - - - *Petitioner*

versus

COMMONWEALTH OF KENTUCKY - *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

---

PETITION FOR WRIT OF CERTIORARI

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October 1, 1995

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24 pp

QUESTION PRESENTED

Whether hypnotically enhanced testimony should be excluded at trial on the ground that it tends to be inherently unreliable?

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No. _____

IN THE

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October Term, 1995

JOSEPH LEE ROWLAND - - - - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - - - *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph Lee Rowland, by *pro bono* counsel, respectfully petitions that a Writ of Certiorari issue to review the opinion of the Supreme Court of Kentucky decided and filed on July 6, 1995.

OPINION BELOW

The opinion of the Supreme Court of Kentucky decided and filed on July 6, 1995 [Appendix] is reported at 901 S.W.2d 871.

JURISDICTION

The opinion of the Supreme Court of Kentucky was decided and filed on July 6, 1995. This Court's jurisdiction

is invoked pursuant to 28 U.S.C. §1257(a) and United States Supreme Court Rule 10.1.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This is a first-degree assault case involving the shooting of the victim Carol Rowland allegedly by her stepson Petitioner Joseph Lee Rowland.

Following the introduction of the victim's direct testimony, Petitioner withdrew his plea of not guilty to two counts of first-degree assault and entered a conditional plea of guilty to reduced charges of second-degree assault. The conditional plea gave Petitioner the right to appeal the ruling on the hypnotically enhanced testimony of the victim Carol Rowland.

> "You are still going to have a right to appeal in this case because of the type of plea that you are entering is called a conditional plea. The Court has made some rulings in this case. In particular it has ruled that the victim in the case, Carol Rowland, has been permitted to testify concerning the events that occurred,

> and she has been permitted to testify recognizing the fact that she has been under hypnosis." [Trial judge, Transcript of Proceedings, May 28, 1992, p. 8]

Petitioner's motion to suppress the victim Carol Rowland's hypnotically enhanced testimony had been denied. [Transcript of Proceedings, May 27, 1992, Section I, pp. 121-122, 126]

This is a classic case of "developing" and "hardening" testimony through hypnosis. The progression is clear.

On January 29, 1991, the victim Carol Rowland was shot. [Carol Rowland trial testimony, Transcript of Proceedings, May 27, 1992, Section II, pp. 104, 111]

From January 29 through February 10, 1991, the victim was treated at the hospital under the care of physician Dr. James F. Bardgett. [Bardgett Deposition, May 12, 1992, p. 5] During that time, the victim never told Dr. Bardgett who shot her.

> Q: From January the 29th, 1991, to February the 10th, 1991, Carol Rowland never told you who shot her; is that correct?
>
> A: Yes, that's correct. [Bardgett Deposition, p. 25]

In fact, Dr. Bardgett was under the impression that on January 29, 1991, the victim "remembered the incident well," but "that *she did not know who shot her.*" [Emphasis added. Bardgett Deposition, p. 30] Dr. Bardgett's report indicated, "[A]ll she remembers is being shot in the back." [Bardgett Deposition, p. 22]

During this same time frame, January 29 through February 10, 1991, when others at the hospital asked her who shot her, the victim did not identify Petitioner.

> Q: After you got to the hospital on January 29th of 1991, . . . [d]o you remember any of the other hospital personnel asking you questions about how it occurred, if they did?

A: Yes. Dr. Pettit. . . . Social Services.

Q: Now, did you tell Doctor Pettit or Social Services or for that matter any of the other medical personnel, if you know, that you saw Joe Rowland shoot or have a gun in his hand?

A: No. [Carol Rowland trial testimony, T.P. II, p. 131]

Not long after the shooting, the victim was interviewed by case detective Steve Kellam. She advised him that she did not recall seeing Petitioner with a gun in his hand.

Q: When you first talked to Detective Kellam about the shooting, did you tell him that you recall seeing Joe Rowland with a gun in his hand?

A: No. [Carol Rowland trial testimony, T.P. II, p. 132]

The difficulty for Detective Kellam's investigation was that the victim could not identify Petitioner as the person who shot her.

On February 4, 1991, Detective Kellam procured a polygraph examination of Petitioner. But the Kentucky State Police polygraph examiner concluded Petitioner "told the truth during this examination" when he answered "No" to the question, "Did you pull the trigger to the gun that shot your 'stepmother' Carol?" [Joseph Lee Rowland Polygraph Report, Prosecution Discovery Materials, Docket Entry No. 12, Record pp. 35-36]

On April 30, 1991, psychiatrist Dr. Bruce A. Snider began treating the victim. [Snider Deposition, May 21, 1992, p. 6] He diagnosed her condition as "post-traumatic stress disorder and secondary depression" which characteristically includes "the symptom of psychogenic amnesia, which is difficulty recalling some aspects or all aspects of the trauma." [Snider Deposition, pp. 6-7, 9]

Q: Did Carol Rowland exhibit this characteristic of post-traumatic stress disorder in that she had an inability to recall some aspects of the event?

A: Yes. [Snider Deposition, p. 10]

Finally, the victim was referred to an F.B.I. hypnotist-consultant, Dr. William C. Wester. [Wester trial testimony, T.P. I, pp. 41, 49-50]

On September 30, 1991, Dr. Wester interviewed the victim. On October 16, 1991, he hypnotized her. [Wester trial testimony, T.P. I, pp. 43-44, 46] Dr. Wester testified that, in his initial interview with the victim on September 30, 1991, the victim was not "absolutely sure" Petitioner had shot her.

> Q: All right, let's — well, "I think I saw Joe Rowland shoot me," is that what you think it says?
>
> A: Right.
>
> Q: She wasn't absolutely sure at that point, is that true?
>
> A: That's true.
>
> Q: So, when she came in to you on the first session, she wasn't one hundred percent sure at that point in time, is that correct?
>
> A: Yeah, apparently so. [Wester trial testimony, T.P. I, p. 57]

In fact, the victim stated right out why she had been referred to Dr. Wester for hypnosis:

> BY DR. WESTER: And so at this point in time, has anyone been charged?
>
> BY MRS. ROWLAND: No. Everything to this day is circumstantial. And Detective Kellam said, "I know he did it, but we have to have some concrete evidence." [Statement of Carol Rowland to Dr. William Wester, September 30, 1991, p. 10]

On October 16, 1991, Dr. Wester hypnotized the victim. As Dr. Wester stated, "[H]er session went well, and I felt that hypnosis was helpful again in enhancing some of those fine memories." [Wester trial testimony, T.P. I, p. 49]

On May 27, 1992, the victim testified at trial that Petitioner shot her.

> Q: Now, what next occurred as you recall?
>
> A: I was shot again while Mark was in the process of getting the kids down to the ground, and I turned around real quick because of the sound and I saw Joe standing in the, on the front part of the house, right at the edge of the house and the deck with the gun in his hand. . . . He turned back around the front of the house really fast. [Carol Rowland trial testimony, T.P. II, pp. 113-114]

Based on this testimony, Petitioner changed his plea to a conditional plea of guilty — conditioned on the right to appeal the issue of excluding hypnotically enhanced testimony. *Rowland, supra,* 901 S.W.2d at p. 871.

REASON FOR GRANTING THE PETITION

Hypnotically enhanced testimony should be excluded at trial on the ground that it tends to be inherently unreliable.

The United States Supreme Court is well aware that there is chasmal division among the states regarding the exclusion of hypnotically enhanced testimony of witnesses. *Please see* the splits delineated in footnotes fourteen, fifteen, and sixteen of *Rock* v. *Arkansas,* 483 U.S. 44 (1987), at pp. 57-58. The conflict among state courts of last resort is delineated at length in "Admissibility of Hypnotically Refreshed Or Enhanced Testimony," 77 *A.L.R.4th* 927-983, and update.

In *Rock,* this Court held that "a *defendant* in a criminal case has the right to take the witness stand and to testify in his or her own defense," including "hypnotically refreshed testimony." *Id.,* p. 49. This Court reasoned, "There is no justification today for a rule that denies an accused the opportunity to offer his own testimony." *Id.,* p. 52.

This Court in *Rock* specifically reserved to another date the issue regarding exclusion of "testimony of previously hypnotized *witnesses.*"

> This case does not involve the admissibility of testimony of previously hypnotized witnesses other than criminal defendants and we express no opinion on that issue. *Rock, supra,* 483 U.S. at p. 58, n. 15.

The present Petition for Certiorari specifically requests this Court to now consider and resolve this important question regarding exclusion of hypnotically refreshed testimony of witnesses other than a defendant.

Petitioner respectfully submits that testimony of a witness that has been hypnotically enhanced is unreliable and difficult to confront, so that it should be completely excluded on the subject enhanced.

In *Rock,* this Court acknowledged the "use of hypnosis in criminal investigations . . . is controversial." *Rock, supra,* 483 U.S. at p. 59. In *Rock,* this Court observed that "[t]hree general characteristics of hypnosis may lead to the introduction of inaccurate memories:

> the subject becomes 'suggestible' and may try to please the hypnotist with answers the subject thinks will be met with approval; the subject is likely to 'confabulate,' that is, to fill in details from the imagination in order to make an answer more coherent and complete; and, the subject experiences 'memory hardening,' which gives him great confidence in both true and false memories, making effective cross-examination more difficult." [Scientific citations omitted.] *Rock, supra,* 483 U.S. at pp. 59-60.

In *Rock,* Chief Justice Rehnquist, Justice White, Justice O'Connor, and Justice Scalia would have upheld Arkansas' rule excluding hypnotically enhanced testimony *of a defendant.* They were outvoted only on the ground that *a defendant* has a "constitutional right to testify in her own

defense." *Rock, supra,* 483 U.S. at p. 63. The present Petition is not burdened by such a ground.

Indeed, it is respectfully submitted that hypnotically enhanced testimony must be excluded because its "trustworthiness is inherently suspect," as observed by the dissenting Justices in *Rock, supra,* 483 U.S. at p. 64.

In its opinion below, the Supreme Court of Kentucky divided 4-3 to allow the hypnotically enhanced testimony of the witness. The four-member majority so held because ~~it~~ determined that the hypnotically enhanced testimony of the witness was similar to her pre-hypnosis statement.

> In her statement given under hypnosis, Carol's description of the events leading up to the shooting showed "very little difference" from her pre-hypnosis description. Dr. Wester described her statement given under hypnosis as "basically, just more fine-tuned." *Rowland* v. *Commonwealth,* Ky., 901 S.W.2d 871, 872 (1995) [Appendix]

In a dissenting opinion written by Chief Justice Stephens, the three-member minority would have rejected the hypnotically enhanced testimony of the witness.

> The post-hypnotic statements of the witness, in my view, should be found *inadmissible per se.* The testimony in question inherently involves dangerous problems with reliability. [Court's emphasis.] *Rowland, supra,* 901 S.W.2d at p. 874.

Chief Justice Stephens wrote that even a favorable comparison of "the witness' pre- and post-hypnotic statements" is not enough "to protect the person against whom this testimony is directed."

> I recognize that the majority addresses these issues in its resolution of the case by examining the reliability of the statements in looking at both the witness' pre- and post-hypnotic statements. I cannot agree that this is enough to protect the person against

whom this testimony is directed. An examination of this type does not alleviate other potential risks associated with hypnosis.

For example, it is often recognized that persons who have undergone hypnosis will begin to believe with more certainty the memories recalled under hypnosis. [Citation omitted.] As a result, the witness will appear more believable at trial. Further, witnesses who have undergone hypnosis may confuse the memories prior to hypnosis with recall *or* fabrications that occurred during hypnosis. [Citation omitted.] When this confused witness takes the stand for a third reiteration of his or her testimony, there exists the possibility that a third version of events or testimony may result. The majority's treatment of hypnotic statements does nothing to address these potentially harmful effects. *Rowland, supra,* 901 S.W.2d at p. 874.

Many cases from the highest courts of the various states catalog the inherent unreliability of hypnotically enhanced testimony of witnesses. These cases relate the factors which universally condemn hypnotically enhanced testimony as unreliable. For instance, in *State* v. *Haislip,* Kan., 701 P.2d 909 (1985), cert. denied 474 U.S. 1022, the Supreme Court of Kansas catalogued "suggestibility," "confabulation," and "increased confidence."

Given the problems inherent in the hypnotic process, such as the enhanced suggestibility of the subject, the tendency to confabulate when there are gaps in recollection, and the increased confidence in the truthfulness and accuracy of posthypnotic recall which may preclude effective cross-examination, hypnotically refreshed testimony is simply too unreliable to be used as evidence in a judicial setting. *Haislip, supra,* 701 P.2d at pp. 925-926.

Also, for instance, in *Commonwealth* v. *Nazarovitch,* Pa., 436 A.2d 170 (1981), the Supreme Court of Pennsylvania

catalogued enhanced confidence which "cannot be undermined through cross-examination."

> [T]he hypnotic subject, upon awakening, is often imbued with a confidence and conviction as to his memory which was not present before. Prehypnosis uncertainty becomes molded, in light of additional recall experienced under hypnosis, into certitude, with the subject unaware of any suggestions that he acted upon or any confabulation in which he engaged. The subject's firm belief in the veracity of his enhanced recollection is honestly held, and cannot be undermined through cross-examination." *Nazarovitch, supra*, 436 A.2d at p. 174.

These factors demonstrating the unreliability of hypnotically enhanced testimony are well established in the opinions of the state courts. These factors demonstrating unreliability are set forth by this Court in *Rock* v. *Arkansas, supra*, 483 U.S. at 59-60, with citations to scholarly literature. In the event that certiorari is granted in the present case, these factors can be located in the cases and literature and developed at length in briefs on the merits.

Defense counsel raised these matters in the trial court. [Motion to Suppress Hypnotically Refreshed Testimony, Docket Entry No. 18, Record pp. 60-63; *Rowland, supra*, 901 S.W.2d at p. 872] Counsel on appeal raised these matters before the Supreme Court of Kentucky, raising Fifth Amendment due process and Sixth Amendment confrontation considerations implicated by the inherent unreliability of hypnotically enhanced testimony of a witness. [Brief for Appellant before the Supreme Court of Kentucky, at p. 24; *Rowland, supra*, 901 S.W.2d, dissenting opinion, at p. 874]

It is respectfully submitted that hypnotically enhanced testimony of a witness in a criminal case is inherently unreliable, in violation of a defendant's rights to due process and confrontation, so that it should be excluded.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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October 1, 1995

APPENDIX

RENDERED: JULY 6, 1995
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

94-SC-387-DG

JOSEPH LEE ROWLAND, - - - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - - - - *Appellee.*

Appeal From Court of Appeals
92-CA-001615
(Grant Circuit Court No. 91-CR-059)

OPINION OF THE COURT BY JUSTICE SPAIN

AFFIRMING

Following the introduction of proof by the Commonwealth, the appellant withdrew his plea of not guilty to two counts of first degree assault and entered a conditional "Alford" plea of guilty under RCr 8.09 to reduced charges of second-degree assault. Since the appellant was then only seventeen years of age, the trial court sentenced him as a youthful offender pursuant to KRS 640.030, and pursuant to the plea agreement, to ten-year terms of imprisonment, to run concurrently. The Court of Appeals affirmed on his appeal as a matter of right. We granted review and also affirm the conviction and sentence.

Carol and Daniel Rowland were married in 1987. Carol had four children by a previous marriage and Daniel had two sons, including the appellant, Joseph Lee Rowland. On January 29, 1991, Carol and Daniel and the six children were all living together in Grant County. Daniel left for work early, and Carol began getting the children, who ranged from sixteen years old down to five years old, ready

for school. When it was discivered that the batteries were missing from a computer game, Carol told her daughter Kathy Schardine, age thirteen, that her step-son Joe, age fifteen (the appellant), probably took them as "he is the biggest thief in the house." Joe had previously been the cause of problems because of his stealing.

In a short time, while several of the children had begun getting in the family car to be driven to school, Carol looked around for Joe, but couldn't find him. While she was standing on the porch, Carol heard a gunshot and felt pain in her back. As a second shot struck her, she turned and saw Joe standing at the edge of the house with a .38 pistol in his hand. As Kathy ran to her mother, the appellant fired a third shot, which struck Kathy in the back. Carol yelled at the kids, who by now were screaming, crying, and running into the house, to call the state police. In time an ambulance arrived and took Carol to the hospital. While there, she told her husband that she thought his son Joe had shot her and that two of the other children witnessed Joe's shooting of her and Kathy.

As a result of her wounds, Carol suffered permanent paralysis in her right side and was caused to walk with a limp. She also experienced considerable depression, causing her physician to refer her in April 1991 to a psychiatrist, Dr. Bruce A. Snider. Dr. Snider diagnosed Carol as having post-traumatic stress disorder and secondary depression. In his deposition, Dr. Snider described the stress disorder as a type of anxiety resulting from an overwhelming psychological or physical trauma. It is characterized by re-experiencing the traumatic event and avoiding situations which remind the patient of the event. One of the symptoms is the inability to recall certain aspects surrounding the traumatic event.

Dr. Snider prescribed medication for the depression and anxiety and also referred Carol to Dr. William Wester, a psychologist, in September of 1991. Dr. Wester agreed with Dr. Snider's diagnosis of post-traumatic stress disorder and secondary depression, and decided to treat her

with hypnosis. Before beginning the hypnosis treatment, Dr. Wester took complete statements from Carol about the shooting incident. The first statement was taken on September 30, 1991, and was audiotaped, and the second statement was taken on October 16, 1991, and was videotaped. Following the videotaping, Dr. Wester, on the latter date, put Carol under hypnosis. In her statement given under hypnosis, Carol's description of the events leading up to the shooting showed "very little difference" from her pre-hypnosis description. Dr. Wester described her statement given under hypnosis as "basically, just more fine-tuned." He felt the hypnosis was helpful.

Following his indictment on two counts of first-degree assault of Carol and Kathy, the appellant requested and was granted the retention of an expert on hypnosis to assist him in the case. A defense motion was also filed for the trial court to suppress any testimony by Carol Rowland, on the basis that it had been "hypnotically refreshed." The trial court held a hearing at which both Dr. Wester and the defense expert, Dr. Paschal Baute, testified. The trial judge, Hon. Charles F. Satterwhite, denied the suppression motion but ruled that the Commonwealth would be precluded from informing the jury that Carol had been placed under hypnosis. Further, he gave the defense leave to cross-examine her on this point, and ruled that, if the defense did so, then the Commonwealth would be allowed to introduce additional testimony to explain hypnosis. Complete findings were made and entered by the trial court following this suppression hearing.

Following Carol Rowland's direct examination, the appellant moved to withdraw his plea of not guilty and to enter a conditional plea of guilty under the procedure outlined in RCr 8.09 and in *Alford* v. *North Carolina*, 394 U.S. 956 (1969). The trial court granted the motion and accepted the appellant's guilty plea to two reduced charges of second-degree assault and fixed punishment pursuant to the plea agreement at ten years, imprisonment on each count, to run concurrently. Sentencing in accordance therewith followed.

In the Court of Appeals and now in this Court, the appellant argues that the trial court erred in refusing to suppress the testimony of one of the victims, Carol Rowland, because she had previously undergone hypnosis regarding the circumstances surrounding the shooting of her and her daughter. We are asked to adopt a rule that such testimony should be inadmissible *per se*. Although some states have adopted such a rule, others take the opposite position and admit all such testimony, leaving it to the jury to judge its credibility. (Referred to as the "admissible *per se* doctrine.") Still a third group of jurisdictions has adopted what is referred to as the "safeguards approach," whereby post-hypnosis testimony is held admissible if certain safeguards are employed before and during any such hypnosis.

In its very thorough opinion herein, the Court of Appeals discussed the *Frye*[1] test for the admission of scientific evidence; the effect of the adoption of Rule 702 of the Federal Rules of Evidence and the Kentucky counterpart, KRE 702; and the recent United States Supreme Court decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. ____, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). After so doing, the Court concluded that it would be inappropriate to adopt a *per se* rule excluding hypnotically refreshed testimony in light of *Daubert* and the adoption of the Kentucky Rules of Evidence. The case at hand was tried before the adoption of the Kentucky Rules of Evidence, however, at a time when the *Frye* test would otherwise have been applicable. The Court of Appeals nevertheless observed that it was not necessary even to apply the *Frye* test in this case. The opinion states:

> Many courts — including those that have held hypnotically enhanced testimony inadmissible — have ruled that a witness may testify as to matters demonstrably recalled and related by the witness before he or she was hypnotized. In doing so, they have generally required as a prerequisite to the admission of the

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[1]*Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923).

> testimony that the witness' prehypnotic recollections have been recorded in written or taped form so that the extent and particulars of such recall may be established.
>
> . . .
>
> In the case before us, the trial court conducted an extended inquiry into the circumstances surrounding the hypnosis of Carol Rowland. The court had before it, as do we, the tapes of Carol's statements made before she was hypnotized and while hypnotized, as well as the testimony of two expert and two lay witnesses. The court made findings as to each of the matters referred to in the *Elliotte*[2] and *Tunstall*[3] decisions (although it may not have used the precise language of those decisions) and ruled Carol's testimony admissible. While we shall never know for certain whether the appellant's right to cross-examine Carol was materially impaired by hypnosis inasmuch as he plead guilty before cross-examination could begin, the trial court's decision to admit Carol's testimony is unassailable in light of the fact that she related on direct examination essentially the same facts she had recalled prior to being hypnotized.

We agree that here the decision of the trial court to admit the testimony of Carol Rowland was unassailable.

The appellant also claims that the trial court erred in denying him a continuance on the morning that the trial commenced. The grounds were that the appellant had been ill, which prevented him from assisting counsel in preparation for trial. When the motion was made, however, counsel told the court, "I don't think that's a big problem because of his condition." Then counsel continued, "His witnesses are all here, and I feel that through spending an hour or so each day after court that we can properly

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[2]*Elliotte* v. *State of Delaware*, 515 A.2d 677 (Del. 1986).

[3]*People* v. *Tunstall*, 63 N.Y.2d 1, 479 N.Y.S.2d 192, 468 N.E.2d 30 (N.Y.Ct.App. 1984).

prepare for trial." In view of these comments of counsel, it is clear that the trial court did not abuse his discretion in denying the continuance.

Finally, the appellant, also on the day the trial was to commence, requested the trial court to appoint for him an expert in the field of post-traumatic stress syndrome to assist him in cross-examination of Dr. Bruce Snider. The trial court denied the motion. The appellant's brief does not explain why the expert, Dr. Paschal Baute, previously appointed by the court to assist the appellant, could not also assist in this area. The appellant also fails to show how such an appointment was "reasonably necessary," especially since there was no evidence elicited by the prosecution at trial concerning post-traumatic stress disorder. We perceive no abuse of discretion on the part of the trial judge in denying this motion.

For all the reasons set out above, the judgment of conviction and sentence of the Grant Circuit Court are affirmed.

Lambert, Leibson, and Wintersheimer, JJ., join this opinion by Spain, J. Stephens, C.J., dissents by separate opinion in which Reynolds and Stumbo, JJ., join.

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RENDERED: JULY 6, 1995
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

94-SC-387-DG

JOSEPH LEE ROWLAND, - - - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - - - - *Appellee.*

Appeal From Court of Appeals
92-CA-001615
(Grant Circuit Court No. 91-CR-059)

DISSENTING OPINION BY CHIEF JUSTICE STEPHENS

Respectfully I dissent.

The post-hypnotic statements of the witness, in my view, should be found *inadmissible per se.* The testimony in question inherently involves dangerous problems with reliability. These dangers include not only the possibility of suggestive statements potentially tainting the witness' recollections, but also the potential for confabulations on the part of the witness due to subconsciously rooted motives. For example, the witness may wish to present a more acceptable version of their own participation in the events in question. Under hypnosis, this subconscious motive may be unrecognizably influential to the person being hypnotized. *See People* v. *Shirley,* 723 P.2d 1354 (Cal. 1982).

I recognize that the majority addresses these issues in its resolution of this case by examining the reliability of the statements in looking at both the witness' pre and post hypnotic statements. I cannot agree that this is enough to protect the person against whom this testimony is directed.

An examination of this type does not alleviate other potential risks associated with hypnosis.

For example, it is often recognized that persons who have undergone hypnosis will begin to believe with more certainty the memories recalled under hypnosis. *See Shirley* at 1366. As a result, the witness will appear more believable at trial. Further, witnesses who have undergone hypnosis may confuse the memories prior to hypnosis with recall *or* fabrications that occurred during hypnosis. *Id.* When this confused witness takes the stand for a third reiteration of his or her testimony, there exists the possibility that a third version of events or testimony may result. The majority's treatment of hypnotic statements does nothing to address these potentially harmful effects.

As a result of the foregoing, I must dissent.

Reynolds and Stumbo, JJ., join this dissent.

Supreme Court, U.S.
FILED

95-553 OCT 3 - 1995

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOSEPH LEE ROWLAND,
Petitioner

versus

COMMONWEALTH OF KENTUCKY,
Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

SUPPLEMENTAL APPENDIX

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RENDERED: APRIL 29, 1994; 2:00 p.m.
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COURT OF APPEALS OF KENTUCKY

No. 92-CA-001615-MR

JOSEPH LEE ROWLAND - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - - *Appellee*

Appeal From Grant Circuit Court
Honorable Charles F. Satterwhite, Judge
Indictment No. 91-CR-000059

OPINION—AFFIRMING

BEFORE: HUDDLESTON, JOHNSON and JOHNSTONE, Judges.

HUDDLESTON, JUDGE. Joseph Lee Rowland entered a conditional plea of guilty to two counts of assault in the second degree and was sentenced by Grant Circuit Court to concurrent ten year terms of imprisonment.[1] He appeals pursuant to Rule 8.09 of the Kentucky Rules of Criminal Procedure[2] asserting that the trial court erred when it per-

[1]Rowland, who was seventeen years of age when he entered his plea, was sentenced as a youthful offender according to KRS 640.030.

[2]RCr 8.09 provides: "With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion. A defendant shall be allowed to withdraw such plea upon prevailing on appeal."

mitted a witness who had undergone hypnosis to testify for the Commonwealth. He also maintains that his motion for continuance of his trial should have been granted and that the trial court should have sustained his motion for appointment of an expert on traumatic stress syndrome. Because we are satisfied that the trial court's rulings on each of these issues were correct, we affirm the judgment from which this appeal is prosecuted.

Carol Rowland and her daughter, Kathy Shardine, were shot on January 29, 1991, at the home they occupied with Carol's husband, Daniel, her four children by a previous marriage (including Kathy), and Daniel's two children. Carol was seriously wounded, and for some time after the incident her memory of it was limited. She did, however, tell her husband at the hospital where she received emergency treatment that she thought she had been shot by Daniel's son, the appellant Joe Rowland.

Carol became depressed after the incident and sought treatment from Dr. Bruce A. Snider, a psychiatrist. Dr. Snider diagnosed Carol as suffering from post-traumatic stress disorder and secondary depression. According to Dr. Snider, one symptom of post-traumatic stress disorder is the inability to recall all or part of the traumatic event. Dr. Snider, whose treatment is not at issue on this appeal, referred Carol for further treatment to Dr. William Webster, a psychologist. In the course of his treatment of Carol, Dr. Webster hypnotized her.

Carol gave statements about the shooting to Dr. Webster on September 30, 1991, and again on October 16, 1991. Both statements were given before Carol was hypnotized. The first statement was recorded on audio tape and the second was recorded on videotape. In the statements, Carol described the shooting in some detail and identified her stepson, Joe Rowland, as the person who shot her. Carol recalled additional details about the incident while under hypnosis, and her description of Joe Rowland's appearance at the time of the shooting was more specific.

Prior to trial, appellant moved to suppress Carol's testimony in its entirety, arguing that she had been tainted as a witness because she had undergone hypnosis. The trial court denied the motion to suppress and the case went to trial. Carol was called to testify and, in essence, repeated her prehypnosis description of the shooting incident. She was not asked to — and did not — relate details of the incident first recalled while under hypnosis. Carol never wavered from her identification of Joe Rowland as the person who did the shooting. After Carol testified on direct, the appellant withdrew his pleas of not guilty to the two counts of assault in the first degree and, as earlier noted, entered conditional pleas of guilty to two counts of assault in the second degree.

On appeal, the appellant does not argue that Carol was only able to identify him as the perpetrator of the crime after she was hypnotized. His complaint is that hypnosis enabled Carol to remember the incident in greater detail and to describe the way her stepson looked at the time with greater specificity. According to the appellant:

> These post-hypnosis "recollections" clearly bolstered Carol's confidence in her testimony where she identified the Appellant as her assailant. Prior to the hypnosis, the sole identifying feature of the Appellant that Carol could describe was his eyes. Subsequent to the hypnosis, she could describe the Appellant's head, hair (its color, length, and the way it was parted), and his coat (including its color and the fact it was "frosted"). [T]he hypnosis in this case bolstered Carol's definitive trial identification of the Appellant, based on these new "detailed" particulars of the Appellant's descriptions (sic).

The appellant argues for a "per se" rule which would preclude from testifying any witness who has undergone hypnosis. In *Rock* v. *Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), the United States Supreme Court held that a state could not erect a per se rule excluding hypnotically refreshed testimony from a criminal defendant. While the case before this Court involves testi-

mony from a witness rather than a defendant, an issue *Rock* specifically did not reach, *Rock* does describe the three main approaches used by states dealing with this issue. One approach is to establish a per se rule excluding any hypnotically refreshed testimony at trial; however, even under this rule, the witness is still allowed to testify about the details of events that he recalled prior to undergoing hypnosis. See, e.g., *Contreras* v. *State*, 718 P.2d 129 (Alaska 1986). Another approach holds that hypnosis affects the credibility, not the weight, of testimony and that such testimony is admissible at trial. See, e.g., *State* v. *Brown*, 337 N.W.2d 138 (N.D. 1983). The third approach admits hypnotically refreshed testimony if certain procedural safeguards are met. See, e.g., *State* v. *Hurd*, 432 A.2d 86 (N.J. 1981).

The rationale of the cases adopting a per se rule excluding hypnotically refreshed testimony is that hypnosis has not met the general acceptance in the scientific community standard for the admission of scientific evidence set forth in *Frye* v. *United States*, 54 App. D.C. 46, 293 F. 1013 (1923). See, e.g., *State* v. *Peoples*, 311 N.C. 515, 319 S.E.2d 177 (1984). As was explained in *Hall* v. *Commonwealth*, 12 Va.App. 198, 403 S.E.2d 362, 369 (1984):

> While hypnotically refreshed testimony is not "scientific evidence" per se, since the testimony in question is that of a lay witness rather than an expert opinion, it has been generally held that the Frye analysis is equally applicable to hypnotically refreshed testimony, because the testimony given by the lay witness is the product of scientific intervention.

The courts of this Commonwealth also apply the *Frye* standard when determining whether to admit scientific evidence. See *Harris* v. *Commonwealth*, Ky., 846 S.W.2d 678 (1992). Since the *Harris* decision was handed down, the United States Supreme Court has held in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), that the adoption of the Federal Rules of Evidence superseded any past reliance on the

Frye test and that the proper standard for judging the admissibility of scientific evidence is provided by FRE 702. The Supreme Court ruled that, upon making a determination that the scientific evidence in question will assist the trier of fact to understand or determine a fact in issue under FRE 104(a), the trial court should conduct a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can be properly applied to the facts in issue." *Daubert*, 509 U.S. at ____, 113 S.Ct. at ___, 125 L.Ed.2d at 482. In making this determination, the trial court should consider such factors as whether the theory or technique has been tested; whether it has been subjected to peer review and publication; its known or potential rate of error; and finally, the degree of acceptance the theory or technique enjoys in the scientific community. *Id.*, 509 U.S. at ___, 113 S.Ct. at ___, 125 L.Ed.2d at 482.

In July of 1992, Kentucky adopted a modified version of the Federal Rules of Evidence for use in the courts of this state. Rule 702 of the Kentucky Rules of Evidence, which governs the admissibility of expert testimony and which is identical to FRE 702, provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In light of *Daubert* and the adoption of the Kentucky Rules of Evidence, it is inappropriate to adopt a per se rule excluding hypnotically refreshed testimony. However, we are aware that the trial and resultant guilty plea in this matter took place prior to the formal adoption of the Kentucky Rules of Evidence. Accordingly, the *Frye* test must be applied if hypnotically refreshed testimony is to be admitted.

> It must be found by the trial court that the evidence "be sufficiently established to have gained general ac-

> ceptance in this particular field in which it belongs." The party offering the evidence has the burden of proving that this new evidence has gained general acceptance as reliable in the relevant scientific community.

However, it is not necessary that the *Frye* test be applied in this case. Many courts — including those that have held hypnotically enhanced testimony inadmissible — have ruled that a witness may testify as to matters demonstrably recalled and related by the witness before he or she was hypnotized. In doing so, they have generally required as a prerequisite to the admission of the testimony that the witness' prehypnotic recollections have been recorded in written or taped form so that the extent and particulars of such recall may be established. See the cases from the states of Alaska, Arizona, Delaware, Kansas, Maryland and Ohio cited in Thomas M. Fleming, Annot., *Admissibility of Hypnotically Refreshed or Enhanced Testimony*, 77 ALR 4th 927, 940 (1990), as well as the Virginia case, *Hall* v. *Commonwealth*, *supra*.

Some states require the trial court confronted with a witness who has been hypnotized to conduct a hearing

> . . . to consider the amount of confidence the witness had in his initial recollection before he was hypnotized, the extent of the witness' belief in the efficacy of hypnosis to yield truth, the nature of the questioning employed, and any other factors relevant to a determination whether hypnosis so enhanced the witness' confidence in his original recollection that the opposing party's right to cross-examination has been substantially impaired.

Annot., 77 ALR 4th at 940. In *Elliotte* v. *State of Delaware*, 515 A.2d 677, 680 (Del. 1986), for example, the court observed that "nearly all states which have addressed the . . . issue . . . have ruled that testimony as to prehypnotic recollections is admissible." Consistent with those decisions, the Delaware Supreme Court ruled that "pretrial use of hypnosis does not necessarily render the witness incompetent to testify to events recalled prior to being hypnotized." *Id.* at 681.

The Delaware court went on to hold that the trial court should conduct a hearing to determine whether hypnosis has substantially impaired the defendant's ability to cross-examine the witness or was otherwise improper. At such hearing, the trial court must first decide whether the scope of the witness's prehypnotic recollection can be reliably determined. Then the court must determine whether hypnosis so enhanced the witness's confidence in his or her testimony that the opposing party's right to cross-examination has been materially impaired. In making the latter determination, the Delaware Supreme Court admonished trial courts to consider the six factors set forth in *People* v. *Tunstall*, 63 N.Y.2d 1, 479 N.Y.S.2d 192, 196, 468 N.E.2d 30, 34 (N.Y.Ct.App. 1984):

> (1) The amount of confidence the witness had in her initial recollection prior to being hypnotized;
>
> (2) The extent of her belief in the ability of hypnosis to yield the truth;
>
> (3) The degree to which she was hypnotized;
>
> (4) The length of the session;
>
> (5) The type and nature of questioning employed; and
>
> (6) Any other factors which the court may deem important based upon the specific facts and circumstances of this case.

Elliotte, 515 A.2d at 681.

In the case before us, the trial court conducted an extended inquiry into the circumstances surrounding the hypnosis of Carol Rowland. The court had before it, as do we, the tapes of Carol's statements made before she was hypnotized and while hypnotized, as well as the testimony of two expert and two lay witnesses. The court made findings as to each of the matters referred to in the *Elliotte* and *Tunstall* decisions (although it may not have used the precise language of those decisions) and ruled Carol's testimony admissible. While we shall never know for certain whether the appellant's right to cross-examine Carol was materially impaired by hypnosis inasmuch as he plead

guilty before cross-examination could begin, the trial court's decision to admit Carol's testimony is unassailable in light of the fact that she related on direct examination essentially the same facts she had recalled prior to being hypnotized.

Appellant's other issues do not merit nearly as much discussion. The appellant contends that he was entitled to a continuance of his trial due to illness, which limited his ability to consult with his attorney. Initially, we note that the trial court has considerable discretion when dealing with a motion for a continuance. *Abbott* v. *Commonwealth*, Ky., 822 S.W.2d 417 (1992). In light of appellant's trial counsel's representation to the court that by staying with his client after trial each day that he could properly prepare him, we find no abuse of discretion in the denial of a continuance.

Appellant also complains that the trial court erred when it denied his motion for an expert on traumatic stress syndrome to rebut testimony about this syndrome from Dr. Snider. Again, this is an area where trial courts have discretion to decide whether the use of an expert witness is reasonably necessary pursuant to *Ake* v. *Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). See *Hicks* v. *Commonwealth*, Ky., 670 S.W.2d 837 (1984). The record reveals that the appellant waited until the day of trial to make his motion for a rebuttal expert. In light of the appellant's failure to timely make this motion, we cannot say that the trial court erred by denying it.

The judgment is affirmed.

ALL CONCUR.

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NO. (3)

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JOSEPH LEE ROWLAND — PETITIONER

versus

COMMONWEALTH OF KENTUCKY — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE KENTUCKY SUPREME COURT

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RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinions of the Kentucky Supreme Court and the Kentucky Court of Appeals are correctly set forth in slip form in petitioner's Appendix and Supplemental Appendix.

JURISDICTION

Petitioner has properly claimed jurisdiction pursuant to 28 U.S.C. §1257(a). However, respondent contests petitioner's assertions that this Court has jurisdiction pursuant to United States Supreme Court Rule 10.1.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has properly listed the constitutional provisions involved in this matter.

COUNTERSTATEMENT OF THE CASE

Petitioner entered a conditional guilty plea in Grant Circuit Court to two counts of second degree assault. He was sentenced to a total of 20 years imprisonment. Pursuant to the conditional guilty plea, petitioner appealed to the Kentucky Court of Appeals. The Kentucky Court of Appeals affirmed petitioner's convictions. Petitioner thereafter requested the Kentucky Supreme Court to grant discretionary review of the decision of the Court of Appeals. The Kentucky Supreme Court granted discretionary review and affirmed the Court of Appeals decision upholding petitioner's convictions.

Petitioner has now filed a petition for a writ of certiorari to the Kentucky Supreme Court.

COUNTERSTATEMENT OF THE FACTS

Carol and Daniel Rowland were married in 1987. Daniel had two children from a previous marriage: petitioner, 15 years old in 1991 and Mark, 12 years old. Carol had four children from a previous marriage: Eddie Schardine, 16; Kathy Schardine, 13; Billy Schardine 6; and Denny Schardine, 5. In January, 1991, Carol, Daniel and the six children were all living together.

On January 29, 1992, Carol and Daniel woke up at 5:30 a.m. Around 5:40 a.m., Daniel left for work. He kissed Carol good-bye and told her he loved her. Carol then started getting the children ready for school. She woke Kathy first. A few minutes later she woke Mark and Joe and then Billy and Denny. She let Eddie sleep because he was not going to school that day.

Each morning Carol would drive the children to the school bus stop. Petitioner's morning chore was to warm-up the car and scrape the frost from the windows. On January 29, 1992, it was very cold

with a heavy frost. Carol looked out the window about five minutes before time to leave for the bus stop and noticed the car was running. She thought it unusual petitioner did not have to be reminded as usual to go start the car. She did not see petitioner around the car.

Mark, Kathy, Billy and Denny went outside to get in the car. Carol walked back in the house to look for petitioner. She saw Eddie still sleeping. She did not find petitioner. She walked back outside and asked the other children if they had seen him. They responded in the negative.

As Carol was standing on the porch she heard the sound of a gunshot. She immediately felt as though "somebody hit me in the back with a two by four or something". The other children came running. She yelled for Mark to get the children down to the ground. A second shot hit Carol in the back.

Carol turned toward where she had heard the gunshot sound. She saw petitioner standing at the edge of the house with a .38 pistol in his hand.

Carol could feel blood running out of her chest. She was having difficulty breathing. The first bullet had entered her back and exited her chest. The second bullet lodged in her back. Carol laid down on the ground.

Kathy ran to her mother. Petitioner fired a third shot which struck Kathy in the back. Kathy stumbled and crawled back to the house. The other kids also ran into the house. They were screaming and crying. Carol yelled at them to call the state police. Carol lost a lot of blood and became disoriented. She remembered being in an ambulance and taken to a hospital.

As a result of her wounds, Carol suffered permanent paralysis in her right side. As a result of the shooting, Carol became depressed. She "was freaking out about getting shot and my daughter getting shot". In April, 1991, her treating

physician referred her to Dr. Snider, a psychiatrist. Dr. Snider diagnosed Carol as having post-traumatic stress disorder[1] and secondary depression. Dr. Snider prescribed medication for Carol's depression and anxiety. He also referred Carol to Dr. William Wester, a psychologist.

Dr. Wester interviewed Carol on September 30, 1991. Carol told Dr. Wester that after she was shot the second time she turned around and "saw [petitioner] turning and the light hit his eyes". She saw him "roll back around the front of that house with the gun in his hand". She said that in the hospital she told her husband, "I think Joe shot me". She also related that two of the other children witnessed petitioner shoot her and Kathy.

Dr. Wester agreed with Dr. Snider's diagnosis of Carol as secondary depression and post-traumatic

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1 Post-traumatic stress disorder is a type of anxiety due to an overwhelming psychological or physical trauma. It is characterized by re-experiencing the traumatic event and avoiding situations which remind the person of the event. One of the symptoms of post-traumatic stress disorder is the inability to recall certain aspects surrounding the traumatic event.

stress disorder. Dr. Wester decided to place Carol under hypnosis to enhance her memory. On October 16, 1991, Dr. Wester placed Carol under hypnosis. Dr. Wester had Carol describe the events leading up to the shooting and what she remembered about the shooting. "Very little difference" existed in Carol's pre-hypnotic description and what she described under hypnosis. Dr. Wester described Carol's hypnotic description as, "basically, just more fine-tuned". Dr. Wester felt the hypnosis was helpful in "enhancing" some of Carol's "fine memories".

Petitioner was indicted on two counts of first-degree assault arising from his shooting Carol and Kathy Rowland.

Petitioner moved to suppress Carol's testimony on the basis it had been hypnotically refreshed. The trial court held a hearing on petitioner's motion. Dr. Wester and an expert on hypnosis appointed to assist petitioner testified at the hearing.

The trial court overruled petitioner's suppression motion. The trial court stated Carol could testify and the jury then determine the credibility and believability of her testimony as it would do with any other witness. However, the court ruled the Commonwealth would be precluded from introducing the fact Carol was placed under hypnosis, but stated petitioner could choose to cross-examine Carol on this point. If petitioner did choose to cross-examine Carol about the hypnosis, the trial court stated it would then allow the Commonwealth to introduce additional testimony to explain hypnosis.

Carol testified at trial. After Carol's direct examination, petitioner notified the court he wished to withdraw his not guilty plea and enter a conditional guilty plea. The trial court accepted petitioner's guilty plea. Pursuant to the plea agreement, the two first-degree assault charges were amended to second-degree assault. He was

sentenced to ten years imprisonment on each count, said sentences to run concurrent.

Pursuant to the conditional guilty plea, petitioner appealed to the Kentucky Court of Appeals. The Kentucky Court of Appeals affirmed petitioner's convictions. Petitioner thereafter requested the Kentucky Supreme Court to grant discretionary review of the decision of the Court of Appeals. The Kentucky Supreme Court granted discretionary review and affirmed the Court of Appeals decision upholding petitioner's convictions.

Petitioner has now filed a petition for a writ of certiorari to the Kentucky Supreme Court.

REASONS FOR DENYING THE WRIT

THE KENTUCKY SUPREME COURT'S DECISION FOLLOWS THE MAJORITY VIEWPOINT THAT A WITNESS SHOULD NOT BE DISQUALIFIED FROM TESTIFYING ON THE GROUND SHE WAS HYPNOTIZED BEFORE TRIAL AND HER PRE-TRIAL AND POST-TRIAL HYPNOTIC STATEMENTS WERE THE SAME.

In his petition for certiorari, petitioner portrays that Carol Rowland's identification of him

as her assailant came only after she was hypnotized. Petitioner ignores the true state of the evidence. In actuality, Carol adamantly identified petitioner as her assailant before she was hypnotized. In her pre-hypnosis statement, Carol stated that after she was shot the second time, she turned around and "saw [petitioner] turning and the light his eyes." She saw petitioner "roll back around the front of the house with the gun in his hand." (Statement of Carol Rowland, pp. 6, 13.) She said that while in the hospital she told her husband, "I think Joe shot me." (Statement of Carol Rowland, p. 9.) She also related that two of her other children saw petitioner shoot her and her daughter. (Statement of Carol Rowland, pp. 10-11.) Contrary to petitioner's representations, this is not a case where hypnosis enabled a witness to remember previously unknown facts. The only additional facts Carol recalled during hypnosis were comments concerning seeing petitioner's hair and jacket.

Petitioner bases his request for certiorari on his claim that the Kentucky Supreme Court's decision is in conflict with the majority of other jurisdictions. This is wholly inaccurate. The overwhelming majority of states and federal circuits have rejected a per se rule of inadmissibility. By and large the courts require the trial court to make a preliminary assessment of admissibility, considering several factors including adherence to procedural guidelines to determine whether the proposed testimony is reliable and its probative value outweighs its prejudicial effect. If the evidence is then admissible, it is treated as any other competent evidence, with its weight and credibility to be adjudged by the jury. Further, many of the jurisdictions which originally excluded testimony generated by hypnotically expanded memory have modified their extreme positions in that a witness may nevertheless testify with regard to those matters which he or she was able to recall and

relate prior to hypnosis. As noted by the Virginia appellate courts in Hall v. Commonwealth, 12 Va. App. 198, 403 S.E.2d 362 (1991):

> We believe that the appropriate way to resolve these competing interests is to adopt the majority rule and permit a witness who has undergone hypnosis to testify as to those events recalled prior to undergoing hypnosis so long as this pre-hypnotic recall has been adequately documented.

See also: Chamblee v. State, 527 So.2d 173 (Ala.Cr.App. 1988); People v. Romero, 745 P.2d 1003 (Colo. 1987), cert. denied Romero v. Colorado, 485 U.S. 990, 99 L.Ed.2d 506, 108 S.Ct. 1296 (1988); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240 (1974); State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974); State v. Jorgenson, 8 Or.App. 1, 492 P.2d 312 (1971); Pearson v. State, Ind. 441 N.E.2d 468 (1982); House v. State, 445 So.2d 815 (Miss. 1984); State v. Varela, 112 N.M. 538, 817 P.2d 731 (1991); State v. Johnston, 39 Ohio St.3d 48, 529 N.E.2d 898 (1988); State v. Armstrong, 110 Wis.2d 555, 329 N.W.2d 386 (1983); Commonwealth v. Kater, 409 Mass. 433, 567 N.E.2d 885 (1991); Prime v.

State, 767 P.2d 149 (Wyo. 1989); State v. Glebock, 616 S.W.2d 897 (Tenn.Cr.App., 1981); State v. Brown, 337 N.W.2d 138 (N.D. 1983); Zani v. State, 758 S.W.2d 233 (Tex.Cr.App. 1988); State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981); State v. Iwakiri, 682 P.2d 571 (Idaho 1984); People v. Smrekar, 68 Ill.App.3d 379, 24 Ill. Dec. 707, 385 N.E.2d 848 (1979); State v. Greer, 609 S.W.2d 423 (Mo.Ct.App. 1980), vacated on other grounds Missouri v. Brown, 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981); Brown v. State, 426 So.2d 76 (Fla.Dist.Ct.App. 1st Dist. 1983); State v. Martin, 33 Wash.App. 486, 656 P.2d 526 (1982); Hall v. Commonwealth, 12 Va.App. 198, 403 S.E.2d 362 (1991); State ex rel. Neely v. Sherrill, 165 Ariz. 508, 799 P.2d 849 (1990); People v. Lee, 434 Mich. 59, 450 N.W.2d 883, cert. denied, 498 U.S. 879, 111 S.Ct. 211, 112 L.Ed.2d 171 (1990); Elliotte v. State, 515 A.2d 677 (Del. 1986); State v. Moreno, 68 Haw. 233, 709 P.2d 103 (1985); State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983); State v.

Koehler, 312 N.W.2d 108 (Minn. 1981); State v. Patterson, 213 Neb. 686, 331 N.W.2d 500 (1983); People v. Hughes, 59 N.Y.2d 523, 466 N.Y.S.2d 255, 453 N.E.2d 484 (1983); United States v. Awkward, 597 F.2d 667 (9th Cir. 1979) cert. denied, 444 U.S. 885, 100 S.Ct. 179, 62 L.Ed.2d 116 (1979); Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir. 1985); cert. denied, 475 U.S. 1046, 106 S.Ct. 1263, 89 L.Ed.2d 572 (1986); Beck v. Norris, 801 F.2d 242 (6th Cir. 1986); Wicker v. McCotter, 783 F.2d 487 (5th Cir. 1986) cert. denied 478 U.S. 1010, 106 S.Ct 3310, 92 L.Ed.2d 723; McQueen v. Garrison, 814 F.2d 951 (4th Cir. 1987), cert. denied 484 U.S. 944, 108 S.Ct. 332, 98 L.Ed.2d 359.

This Court's decision in Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) supports the Kentucky courts' decision to admit Carol Rowland's testimony. In Rock v. Arkansas, this Court was faced with an Arkansas statute prohibiting any defendant from testifying who had

previously been under hypnosis. This Court held the statute violated a defendant's constitutional right to testify in his own behalf. This Court did decline to specifically address the issue of admissibility of testimony of previously hypnotized witnesses other than criminal defendants. Fn. 15, 438 U.S. at 58, 107 S.Ct. At 2712, 97 L.Ed.2d at 50. However, after reviewing the literature and the caselaw of the various jurisdictions pertaining to hypnosis, this Court concluded:

> Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnotic recollections. The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified. But it has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial.

483 U.S. at 61, 107 S.Ct. at 2714, 97 L.Ed.2d at 52.

Thus, this Court found the utilization of safeguards, corroboration and traditional means of testing believability to be sufficient tests of reliability to admit hypnotically refreshed testimony. The Kentucky courts followed this route in ruling the challenged testimony in the instant case would be admissible. Before admitting the challenged testimony, the trial court found:

1. Dr. Wester is an experienced and trained psychologist and in fact is board certified in clinical hypnosis.

2. Dr. Wester is independent of the Commonwealth of Kentucky in that he is not regularly employed by the Commonwealth, the Kentucky State Police, or any entity thereof.

3. An accurate summary exists of the information Dr. Wester received before the videotape of the hypnosis began.

4. Dr. Wester obtained a description of the events from Carol Rowland before the hypnosis session began.

5. The sessions between Dr. Wester and Carol were either audio or video recorded.

6. Only Dr. Wester and Carol were present during the sessions.

7. The hypnotic session was not overly suggestive and was devoid of any leading questions.

8. The probative value of Carol's testimony outweighs the prejudicial effect of the fact she went through a hypnotic session, especially in light of the safeguards the trial court was going to impose.

9. Other corroborating evidence supports Carol Rowland's testimony.

10. The trial court balanced the relevancy, reliability and helpfulness of the testimony against the likelihood of any waste of time, confusion and prejudice.

11. The procedure of examination and cross-examination of Carol Rowland, even though her memory was enhanced by hypnosis will put the jury in the same position as any other witness who would testify.

As noted in both the Kentucky Court of Appeals and Kentucky Supreme Court decisions, the trial court's extensive findings of fact corresponded to safeguards utilized in other jurisdictions. See

e.g.: Elliotte v. State of Delaware, 515 A.2d 677 (Del. 1986) and People v. Tunstall, 63 N.Y.2d 1, 479 N.Y.S.2d 192, 468 N.E.2d 30 (N.Y.Ct.App 1984). See also: State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981).

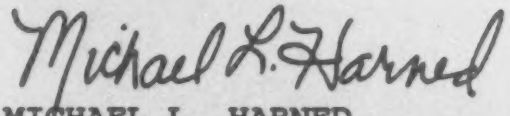
Appellant, therefore, is simply incorrect in arguing the Kentucky Supreme Court's decision is out of step with other jurisdictions which have addressed this issue. As such, no compelling reasons exists for this Court to grant his petition for writ of certiorari.

CONCLUSION

For the above-stated reasons, the respondent respectfully submits that the Petition for Writ of Certiorari to the Kentucky Supreme Court should be denied.

Respectfully submitted,

CHRIS GORMAN
ATTORNEY GENERAL



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